tically failed to execute its oversight function and instead Mr. Small received a *Judgment* which fails to discuss a single one of his arguments and which commits clear error 1) by determining for the first time that the FCC has "discretion," to ignore evidence when selecting a licensee and all this without a word of explanation regarding the source of the purported "discretion;" 2) by employing that court's own *post hoc* rationalizations, unsupported by the FCC's orders or even the record, in upholding the agency's unreasoned decision; and 3) by creating the "facts" that Mr. Small's and WNNX's proposed communities are "suburbs" of Atlanta and that the proposals are "similar."

Mr. Small is entitled to have substantial arguments considered in a meaningful manner and not have them summarily dismissed via agency and judicial muteness or via judge made rationalizations. The Court of Appeals did not ask a single question at oral argument regarding purported agency discretion or the purported similarity of the competing proposals, topics which are not discussed in the FCC's orders nor its brief before the Court of Appeals. The rationalizations used to deny Mr. Small's request for relief spring from left field and fail to address either the evidence raised by Mr. Small nor Mr. Small's arguments concerning the FCC's misapplication of the "mutual economic reliance" test.

In *Eberhart v. United States*, No. 04-9949, Slip Op. at 8, decided October 31, 2005 (*per curiam*), the Court reversed an appeals court, but determined that the appeals court "neither forced the issue by upsetting what the Court of Appeals took to be our settled precedents, nor buried the issue by proceeding in a summary fashion. By adhering to its understanding of precedent, yet plainly expressing its doubts, it facilitated our review." Instantly, the Court of Appeals ignored, without discussion, *Chenery's* limiting of review to rationale supplied by the agency despite being squarely presented with the requirement. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (agency may be upheld only upon rationale found in its

orders); *Small Brief*, No. 04-1056, at 20; *Small Petition for Rehearing En Banc*, No. 04-1056, at 2, 8. Moreover, the Court of Appeals ignored, without discussion, substantial economic evidence relating to the Atlanta Airport despite the requirement of 5 U.S.C. § 706 to review the "whole record" and not just those portions which support the agency's determination. *Small Brief*, No. 04-1056, at 20-21; *Small Petition for Rehearing*, No. 04-1056, at 4; *Small Petition for Rehearing En Banc*, No. 04-1056, at 6-7. Furthermore, the Court of Appeals ignored, without discussion, the fact that matters committed to agency "discretion" are extremely limited and that agency discretion is not applicable to comparative licensee selection at the FCC. *Small Petition for Rehearing*, No. 04-1056, at 2, citing *Lincoln v. Vigil*, 508 U.S. 182, 190 (1993); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); *Small Petition for Rehearing En Banc*, No. 04-1056, at 6-7, citing *Lincoln* and *Citizens to Preserve Overton Park*. The Court of Appeals clearly erred and reversal is required. *See INS v. Fredy Orlando Ventura*, 537 U.S. at 17 (reversal upon clear error).

The Court of Appeals not only forces legal issues by ignoring clear appellate review requirements, it buried Mr. Small's arguments by failing to address a single one of them. Mr. Small plainly made the necessary arguments and presented substantial economic evidence and "mutual economic reliance" test application information to the FCC and to the Court of Appeals; that information is not rendered inutile merely because the FCC and the Court of Appeals fail address it. *Dye V. Hoffbauer*, No. 04-8384, Slip Op. at 2-3, decided October 11, 2005 (*per curiam*) ("It is too obvious to merit extended discussion that whether the exhaustion requirement . . . has been satisfied cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court. . .") (internal quote omitted).

X. CONCLUSION

The Chief Justice testified during his recent confirmation hearing that a judge's institutional function "is to interpret the law, not to make the law. And that applies without regard to what law you'd like to have made or not." Testimony of John G. Roberts, Senate Judiciary Committee, September 14, 2005. However, the judges in this case not only made up law regarding a purported agency "discretion" by which they ignored evidence, they made up their own set of facts to uphold the agency. "The role of an umpire and a judge is critical. They make sure everybody plays by the rules." Opening Statement of John G. Roberts, Senate Judiciary Committee, September 12, 2005. The rules were not followed in the instant case. Incorrect exposition of the law is one thing, but upholding and agency decision on rationale not provided in the agency's orders is not permitted and fact creation by a Federal appellate court to uphold a governmental action is inimical to property and liberty interests.

The Chief Justice testified at his recent confirmation hearing that "if the Constitution says that the little guy should win, the little guy's going to win in court before me. But if the Constitution says that the big guy should win, well, then the big guy's going to win, because my obligation is to the Constitution." Testimony of John G. Roberts, Senate Judiciary Committee, September 15, 2005. Surely all would agree that the "little guy" prevails not only if the Constitution requires it, but also if statutes and/or federal regulations require it. However, this case has been handled as if operating under a caste system where Mr. Small, surely the little guy in this case, did not even receive reasoned issue discussion much less prevail on the merits.

From top to bottom this case exemplifies the epitome of administrative dysfunction. After more than seven years of litigating not a single word has been uttered by either the FCC or the Court of Appeals which explains how one properly excludes from a study of "mutual economic reliance" the fact

that Atlanta owns and operates the world's largest passenger airport located inside WNNX's proposed city of license. The reader has been to the Airport and knows what it is. This is not *1984* and the very large, economically and socially critical Atlanta Hartsfield Jackson International Airport exists and has an enormous effect upon the lives who live near it even if, to date, not a single Federal decision maker has entertained those facts.

WHEREFORE, it is respectfully requested that the case be remanded to the Court of Appeals with instructions to examine the "whole record" including, *inter alia*, the FCC's years long failure to address Mr. Small's "mutual economic reliance" information and to exclude judicially made findings of fact and rationalizations.

God save the United States and this Honorable Court.

Respectfully submitted,
PRESTON W. SMALL

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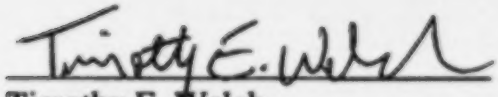
CERTIFICATION OF COUNSEL
No. 05-284

Pursuant to Supreme Court Rule 44.2 undersigned counsel hereby certifies that the instant *Petition for Rehearing* contains discussion of substantial and controlling grounds not previously presented to the Court and that the *Petition for Rehearing* is presented in good faith and not for delay.



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